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In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent erroneously asserts (Br. in Opp. 3) that "[t]his is a pleading case" and that the sole issue is whether its district court complaint alleges facts sufficient to state a claim for relief. This assertion begs the principal question decided by the court of appeals and presented in our petition—the question of the reviewability of whether the Commission actually made a "reason to believe" determination prior to issuing an administrative complaint.[1]

[1]Respondent claims (Br. in Opp. 7-8) that the Commission issued its administrative complaint because it yielded to congressional pressures instead of independently finding "reason to believe." At most, however, respondent's complaint alleges a congressional inquiry into the relationship between the structure of the petroleum industry and shortages of petroleum products. The Commission's investigation into possible unfair methods of competition,

As we have shown in the petition (Pet. 13), a "reason to believe" determination, which is analogous to a finding of probable cause, has no independent significance apart from the supporting factual allegations in the complaint. Moreover, an administrative finding of "reason to believe" has no binding legal effect in and of itself. It simply institutes a hearing procedure that ultimately may culminate either in the issuance of a cease and desist order or in dismissal of the proceeding. In a similar situation this Court held that administrative "probable cause" determinations are not judicially reviewable, even when their immediate consequence is the seizure of property. *Ewing* v. *Mytinger & Casselberry, Inc.* 339 U.S. 594 (1950). The Court recognized that "[t]he harm to property and business can * * * be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." *Id.* at 599. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 146-148 (1967). A fortiori, a "reason to believe" determination—whose only consequence is that a respondent in an administrative proceeding must defend against the allegations in the complaint—should not be reviewable, particularly where Congress has provided for adequate review of any final cease and desist order at the

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however—a subject different from the question of shortages—was carried on for 18 months before the complaint was issued (Pet. 5-6). If the mere chronological coincidence of congressional inquiries and Commission investigations may subject initiation of Commission proceedings to collateral challenge in the district courts, then every major agency proceeding addressing matters of current and substantial public interest is likely to be threatened with disruption at the outset by claims of "political" influence.

conclusion of the proceeding. See *Ewing* v. *Mytinger & Casselberry Inc.*, supra, 339 U.S. at 600-601.

2. Respondent's primary contention (Br. in Opp. 1, 8) is that the questions presented in our petition are governed by settled legal principles established in this Court's earlier decisions. However, the authorities upon which respondent relies do not support this contention.

This Court's decision in *Schilling* v. *Rogers*, 363 U.S. 666 (1960), does not, as respondent contends (Br. in Opp. 9), indicate that agency decisions to issue administrative complaints are judicially reviewable. To the contrary, after examining the terms and history of the Trading with the Enemy Act, the Court in *Schilling* concluded that the refusal of the alien property custodian to return vested property was not reviewable. As we noted in the petition (Pet. 12), the Court has consistently engaged in this type of analysis in determining whether agency action is committed to the agency's unreviewable discretion. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979).[2]

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[2]Respondent relies (Br. in Opp. 9) upon language in *Schilling* v. *Rogers*, *supra*, that suggests that judicial review may be available where "it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers." 363 U.S. at 676-677, citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) and *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Neither *Accardi* nor *Leedom* involved the reviewability of a decision to initiate administrative proceedings. *Accardi* concerned the failure of the Board of Immigration Appeals to exercise independent authority conferred on it by regulation. Absent judicial review, the Board's failure to act would have resulted in immediate deportation of an alien. In contrast to *Accardi*, the Commission's "reason to believe" determination has no legal consequence beyond the institution of administrative proceedings. *Leedom* involved a decision by the National Labor Relations Board to include professional employees

Respondent's reliance (Br. in Opp. 10-12) on *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is similarly misplaced. In that case the Court held that a decision by the Secretary of Labor *not* to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959 to set aside an allegedly invalid union election was subject to limited judicial review at the behest of parties protected by that Act. The Court explained that judicial review was available because Congress had imposed upon the Secretary a mandatory duty owed to parties protected by the Act. *Id.* at 568. Cf. *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Nothing in *Bachowski* suggests that an affirmative decision by the Secretary to initiate an action is independently reviewable. Here, unlike in *Bachowski*, it is settled that a decision by the Federal Trade Commission not to issue an administrative complaint is not subject to judicial review. See *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929). And, as we have demonstrated in the petition (Pet. 12-14), the statutory scheme reflects Congress' intent to insulate from judicial review the Commission's determination in favor of instituting administrative proceedings.

Nor can respondent draw support from Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b) (Br. in Opp. 13). That Section provides that the Commission may seek a preliminary injunction in the district court "[w]henever the Commission has reason to believe" (1) that a violation of any provision of law

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in a collective bargaining unit without first determining, as required by statute, whether a majority of such professional employees would vote for inclusion in such a unit. The Court held that the Board's violation of an express statutory prohibition deprived the professional employees of a right provided by Congress, and that judicial review was available to prevent deprivation of that right. No such consequence follows from the Commission's discretionary action here in initiating administrative proceedings.

enforced by the Commission is occurring or is about to occur; and (2) that it would be in the public interest to enjoin the alleged violation "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review * * * ." The district court may grant such an injunction only "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest * * *."

No court has ever held that the Commission's decision to seek a preliminary injunction is reviewable on the ground that the Commission failed to make a "reason to believe" determination that a violation was occurring or was about to occur. Instead, in determining whether to grant relief under Section 13(b), the courts have focused on whether the Commission has met its burden of showing the likelihood of ultimate success on the merits. See *FTC* v. *National Tea Co.*, 603 F. 2d 694, 698 (8th Cir. 1979). Obviously, if the Commission fails to support the allegations reflecting its "reason to believe," it has not shown that success on the merits is likely, and the district court must therefore deny the injunction. See *FTC* v. *British Oxygen Co.*, 529 F. 2d 196, 199 (3d Cir. 1976) (en banc). Even where an injunction has been denied, however, Section 13(b) does not authorize the district court either to review the Commission's subsequent determination to issue an administrative complaint, or to enjoin the ensuing administrative proceeding.

Respondent similarly errs in asserting (Br. in Opp. 14) that the "reason to believe" provision in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, is analogous to Section 13(1) of the Interstate Commerce

Act, 49 U.S.C. (1976 ed.) 13(1).[3] Section 13(1) requires the Interstate Commerce Commission to provide a forum in which shippers may assert damages claims against carriers for violations of the Act.[4] See, *e.g.*, *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). Section 5 of the Federal Trade Commission Act, however, does not create such a private remedy. See *FTC* v. *Klesner, supra*, 280 U.S. at 25-26. Under respondent's analogy, Section 5 would permit judicial review of the Commission's decision not to issue an administrative complaint. But *Klesner* demonstrates that review is unavailable in those circumstances.[5]

3. Respondent contends (Br. in Opp. 19-22) that the initiation of administrative proceedings constitutes "final agency action" within the meaning of 5 U.S.C. 704. There is no merit to this contention.

The legislative history cited in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 865 (4th Cir. 1961), and upon which respondent relies (Br. in Opp. 19-20), demonstrates that Congress intended "final action" to include " 'any effective agency action for which there is no other adequate remedy in any court.' " But the filing

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[3]This provision has been recodified by Pub. L. No. 95-473, 92 Stat. 1449, as 49 U.S.C. 11701(b).

[4]In the alternative, shippers may elect to pursue remedies against carriers directly in the courts. See 49 U.S.C. (1976 ed.) 8, 9.

[5]Respondent's citation (Br. in Opp. 16) of *Chattanooga Pharmaceutical Ass'n* v. *United States Department of Justice*, 358 F. 2d 864 (6th Cir. 1966), is equally unavailing. That case involved a petition for review of a civil investigative demand issued by the Department of Justice under the Antitrust Civil Process Act. Under 15 U.S.C. 1314 the district court had explicit statutory jurisdiction to review the issuance of the demand. No similar basis for review exists here.

of an administrative complaint has no legal effect other than to initiate a proceeding, and accordingly it does not amount to final action for purposes of judicial review anymore than does the filing of a complaint in court by a United States Attorney. Thus, regardless whether or not the issuance of the complaint is reviewable after the entry of a cease and desist order, it is clear that review is not available at this stage of the proceedings.

Although we disagree with the decisions in *Jewel Companies, Inc.* v. *FTC*, 432 F. 2d 1155 (7th Cir. 1970) and *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965), cited by respondent (Br. in Opp. 21), those cases are inapposite in any event. The preliminary issues held reviewable in those cases involved pure questions of law and, unlike this case, did not require any inquiry into either the thought-processes of the individual Commissioners, or the manner in which the Commission as a body exercised its responsibility to determine whether there was "reason to believe" that a violation occurred.[6] It may be necessary, in certain narrow circumstances, to afford review of purely legal questions that otherwise would be unreviewable under the exhaustion doctrine set forth in *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969). See, *e.g.*, *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 574-577 (2d Cir. 1979). The issues presented by respondent, however, if reviewable at all, must, under *McKart*, await completion of the administrative process.

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[6]In *Jewel Companies*, the question was whether one Commissioner had correctly concluded that he had no discretion to vote against issuance of a complaint on public interest grounds if "reason to believe" otherwise existed. In *Elmo Division*, the Commission attempted to reopen a matter subject to a prior consent order.

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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